IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., Petitioner, v. KIM REYNOLDS; IOWA DEPARTMENT OF HUMAN SERVICES and JERRY FOXHOVEN in his official capacity; IOWA DEPARTMENT OF PUBLIC HEALTH and GERD CLABAUGH in his official capacity, Respondents.	Equity Case No. EQCE084508 **RESISTANCE TO PETITIONER'S MOTION FOR TEMPORARY INJUNCTIVE RELIEF**

COME NOW Respondents Kim Reynolds, Iowa Department of Human Services, Jerry Foxhoven in his official capacity, Iowa Department of Public Health, and Gerd Clabaugh in his official capacity, and in support of their Resistance to Petitioner's Motion for Temporary Injunctive Relief state as follows:

INTRODUCTION

Planned Parenthood of the Heartland seeks to temporarily enjoin certain provisions of House File 766 that relate to eligibility for federal grant money for sex education and teen pregnancy prevention. The federal grants, referred to colloquially as "CAPP" and "PREP" grants, are administered by the Iowa Department of Human Services and the Iowa Department of Public Health respectively. Planned Parenthood of the Heartland has in the past received money from these programs. In 2019, the Iowa legislature passed a law that excludes from the CAPP and PREP programs as an eligible applicant any entity that "performs abortions, promotes abortions, maintains or operates a facility where abortions

are performed or promoted, contracts or subcontracts with an entity that performs or promotes abortions, becomes or continues to be an affiliate of any entity that performs or promotes abortions, or regularly makes referrals to an entity that provides or promotes abortions or maintains or operates a facility where abortions are performed." *See* House File 766 §§ 99, 100. Planned Parenthood of the Heartland argues that such exclusion violates its rights to Free Speech, Free Association, Due Process, and Equal Protection under the Iowa Constitution. It also argues that these provisions are together an unconstitutional bill of attainder.

TEMPORARY INJUNCTION STANDARD

An injunction is an "extraordinary remedy" that should not be granted unless "clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991). The court must "carefully weigh the relative hardship which would be incurred by the parties upon the award of injunctive relief." *Maki*, 478 N.W.2d at 639 (citing *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 208 (Iowa 1980)). The Iowa Supreme Court has "repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion." *Kleman v. Charles City Police Dept.*, 373 N.W.2d 90, 96 (Iowa 1985). Perhaps most important, "[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state." *Iowa State Dept. of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979) (quoting *Kent Products v. Hoeph*, 61 N.W.2d 711, 714-15 (Iowa 1953)).

A court may issue a temporary injunction when "the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff." Iowa R. Civ. P. 1.502(1). The party requesting the injunction has the burden to establish a factual basis for its issuance. *Kleman*, 373 N.W.2d at 95. The standard for considering a request for a temporary injunction is similar to that for permanent injunctions. *Max 100 L.C. v. Iowa Realty Co., Inc.*¸621 N.W.2d 178, 181 (Iowa 2001). To prove that they are entitled to a temporary injunction, Planned Parenthood of the Heartland must show (1) that in the absence of the injunction they will suffer irreparable harm, (2) that they are likely to succeed on the merits, and (3) that injunctive relief is warranted considering the circumstances confronting the parties and "balance[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance." Id. The showing that Planned Parenthood of the Heartland must make here is especially onerous, as a strong presumption of validity protects statutes from constitutional challenges. *Miller v. Iowa Real Estate Commission*¸ 274 N.W.2d 288, 291 (Iowa 1979).

DISCUSSION

I. Planned Parenthood of the Heartland Will Not Suffer Irreparable Harm Absent an Injunction.

Planned Parenthood of the Heartland estimates that, absent an injunction, it will lose $268,000 in grant money. That $268,000 is really what this temporary injunction is about. Planned Parenthood of the Heartland explained that it has already laid the groundwork to provide the services under the CAPP and PREP programs—all it needs is the money. A temporary injunction is not appropriate where any harm caused by its

absence can be remedied through money damages. *See Maki*, 478 N.W.2d at 639 ("An injunction should issue only when the party seeking it has no adequate remedy at law."). Planned Parenthood of the Heartland can continue to provide the services it provides using the CAPP and PREP funds using its own money. As the United States Supreme Court explained, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quotation marks omitted). It will have to find the money even if an injunction is entered, because the rule requires a bond that is 125 percent of the probable liability if a temporary injunction is ordered. *See* Iowa R. Civ. P. 1.1508.

Planned Parenthood of the Heartland's theory on irreparable harm relies on its claim that it will not provide the sex education and teen pregnancy prevention services without funds from the CAPP and PREP programs. It is important to note, though, that the challenged provisions do not prevent Planned Parenthood of the Heartland from continuing to provide those services. In its brief, Planned Parenthood of the Heartland argues that without an injunction it will be "forced" to curtail its educational efforts for vulnerable and "hard-to-reach" Iowans. But it will not be "forced" to do so by House File 766 or the State of Iowa. It is unclear from the motion and affidavit whether Planned Parenthood of the Heartland is unwilling to fund these efforts without the grant money or if it is unable to do so. If the former, Planned Parenthood of the Heartland, not the State, bears the blame. If the latter, an injunction will not help because the writ does not issue until the required bond is posted. *See* Ia. R. Civ. P. 1.1508. 125 percent of $268,000 is $335,000. Planned Parenthood of the Heartland's Annual Report for Fiscal Year 2018 shows end of year unrestricted net assets of more than $13 million, including $6.7 million in cash and cash

equivalents. Exhibit A, P.19-20. Planned Parenthood Federation of America's Annual Report shows $24 million excess revenue over expenses for the last fiscal year and total unrestricted net assets of $255.3 million for the national office. Exhibit B, P.30-32. Planned Parenthood of the Heartland has thus failed to meet its burden to show that an injunction is "clearly required to avoid irreparable damage." *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995) (quoting *Maki*, 478 N.W.2d at 639).

II. Planned Parenthood of the Heartland is Not Likely to Succeed on the Merits.

Planned Parenthood of the Heartland cannot show a likelihood of success at this stage of the litigation because, even if some severable portions of House File 766 are unconstitutional, the State can constitutionally exclude entities that perform abortions from receiving CAPP and PREP funds. The challenged provisions in House File 766 do not violate Planned Parenthood of the Heartland's right to equal protection under the Iowa Constitution and they are not a bill of attainder. It is unnecessary for this Court to address Planned Parenthood of the Heartland's Free Speech and Free Association claims at this stage of the litigation because, even if they ultimately prevail on those claims at trial, the language upon which those claims are based is severable from the exclusion of entities who "perform" abortions.

A. Planned Parenthood of the Heartland does not have a due process right to perform abortions.

The United States Supreme Court has issued several decisions upholding abortion-related conditions on government funding under the unconstitutional-conditions doctrine. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Harris v. McRae*, 448 U.S. 297, 314-15 (1980);

Maher v. Roe, 432 U.S. 464, 474 (1977). Two general principles of the doctrine show how it should apply in the abortion context. First, the State may not condition a benefit on its recipient's sacrifice of her constitutional rights. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983). Second, without a constitutional right to perform abortions, Planned Parenthood of the Heartland cannot succeed on an unconstitutional conditions claim unless the condition requires its patients to relinquish their right to obtain one. *See Planned Parenthood of Greater Ohio v. Hodges*¸ 917 F.3d 908, 911-12 (6th Cir. Mar. 12, 2019). House File 766 does not require a woman to relinquish her right to obtain an abortion in order to participate in the CAPP and PREP programs.

Neither the United States Supreme Court nor the Iowa Supreme Court have ever recognized a due process right to perform abortions. On the contrary, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), suggests that doctors do not have such a due process right. The Sixth Circuit explained just a few months ago that only one federal circuit court decision has recognized such a right, and did so "without meaningful analysis or authority, and most importantly, it did so in a case in which the State did not challenge the existence of the right." *Hodges*, 917 F.3d at 913-15. Alone, this lack of authority supporting its position defeats Planned Parenthood of the Heartland's claim of entitlement to a temporary injunction. *See Hertko*, 282 N.W.2d at 751 ("An injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law … which has not been settled by the law of this state.").

Contrary to a point raised in a footnote in Planned Parenthood of the Heartland's brief, this litigation is not about access to abortion in Iowa. The conditions placed on the

CAPP and PREP grants will not affect the ability of any Iowa woman to obtain an abortion because Planned Parenthood is not going to cease providing or advocating for safe and legal abortions in favor of $268,000 in grant money. *See Hodges*, 917 F.3d at 916 (holding that Ohio law did not unduly burden right to abortion where the record did not support the claim that abortion providers would cease those services in order to remain eligible for government funds). As the *Hodges* Court explained:

> All of which takes us back to where we started. To have an unconstitutional condition, the State must impose the condition on the individual (or entity) with the constitutional right. If there's no right, there's no unconstitutional condition. And the providers have no such constitutional right.

Hodges, 917 F.3d at 916. Because Planned Parenthood of the Heartland does not have a due process right to perform abortions, House File 766 does not unconstitutionally limit eligibility for CAPP and PREP funding to entities that do not perform them. Because Planned Parenthood of the Heartland does not have a right to perform abortions, *a fortiori* it does not have a fundamental right to maintain or operate a facility where abortions are performed.

B. House File 766 does not violate Planned Parenthood of the Heartland's rights under the equal protection clause.

To prove an equal protection violation, the plaintiffs must first establish that the statute treats similarly situated individuals differently. *AFSCME Iowa Council 61 v. State*, __ N.W.2d. __, 2019 WL 2147339, at *6 (Iowa, May 17, 2019). "Generally, however, determining whether classifications involve similarly situated individuals is intertwined with whether the identified classification has any rational basis." *Id.* In most cases, the "very deferential" rational basis test applies. *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa

2009). Classifications based on race, alienage, or national origin and those affecting fundamental rights are subject to heightened scrutiny. *Id.* at 880. Planned Parenthood of the Heartland does not argue that it is a member of a protected class. The provision that excludes entities that perform abortions does not involve a fundamental right because, as explained in section I.A, there is no right to *perform* abortions. The rational basis test applies to that portion of House File 766.

"The rational basis test defers to the legislature's prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational relationship between the classification and the policy justification." *Varnum*, 763 N.W.2d at 879. Importantly, courts will uphold classifications based on judgments the legislature *could have made*, without requiring proof or evidence that they actually did make them. *AFSCME Iowa Council 61*, 2019 WL 2147339, at *6 (quoting *King v. State*, 818 N.W.2d 1, 30 (Iowa 2012)); *see also id.* at *11 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.... 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.").

Planned Parenthood of the Heartland argues that the State does not have a legitimate reason for barring entities that perform abortions from participating in non-abortion sex education and teen pregnancy prevention programs. But there is no question that the State may make a value judgment favoring childbirth over abortion. *See Maher*, 432 U.S. at

474. The legislature could further conclude that it would prefer Iowa teens to receive sex education and teen pregnancy prevention programming for entities other than those for whom abortion represents a significant revenue stream. Even if that does not describe Planned Parenthood of the Heartland, the legislature is entitled to prevent some less scrupulous provider from applying for grant money under the CAPP and PREP programs. The exception for nonprofit health care delivery systems fits with that rationale.

C. House File 766 is not a bill of attainder.

A bill of attainder "is a legislative determination that metes out punishment to a particular individual or a designated group of persons without a judicial trial." *State v. Phillips*, 610 N.W.2d 840, 843 (Iowa 2000). Three elements comprise a bill of attainder: a specific legislative target, imposition of punishment, and absence of a judicial trial. *Id.* To assess whether a law imposes punishment, we look to the intentions of the legislature. *See State v. Swartz*, 601 N.W.2d 348, 351 (Iowa 1999) (noting that if a law is "designed to accomplish some other legitimate governmental purpose [besides imposition of punishment] it should stand"); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 396 (1995) ("What counts ... is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact, the 'sting of punishment,' that may inevitably, but incidentally, flow from it."). The legislature did not intend to punish Planned Parenthood of the Heartland with House File 766. It determined that it did not want to make certain grant money available to applicants who perform or promote abortions.

D. It is unnecessary to decide Planned Parenthood of the Heartland's Free Speech and Free Association claims because even if they were likely to succeed on those claims, they are not entitled to an injunction.

As explained in the foregoing sections, Planned Parenthood of the Heartland is not likely to succeed on its due process and equal protection claims as they relate to House File 766's exclusion of entities that perform abortions from eligibility for CAPP and PREP grants. Because they cannot succeed on those claims, they are not entitled to an injunction that affects their eligibility for the grants. House File 766 makes clear that even if the language that excludes entities who "promote" abortions or affiliate with organizations who perform abortions violates the Iowa Constitution, that language is severable from the other provisions or applications in the bill. House File 766 § 101. Planned Parenthood of the Heartland may be able to proceed with their free speech and free association claims as the litigation continues based on the logic of the United States Supreme Court decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)—that there may be another potential applicant who would be chilled from exercising those rights out of fear of losing eligibility even though Planned Parenthood of the Heartland cannot make itself eligible based on those claims. But Planned Parenthood of the Heartland has not shown a sufficient likelihood that such an entity exists such that a temporary injunction would be appropriate. Indeed, they have averred throughout their petition and motion that they are the only organization whose eligibility is affected by the challenged provisions.

CONCLUSION

Grant of a temporary injunction is an extraordinary equitable remedy. This Court must recognize the presumption of constitutionality that accompanies this law. The rule is

well settled that "a statute will not be declared unconstitutional unless it clearly, palpably, and without doubt infringes the constitution." *Zilm v. Zoning Bd. of Adjustment*, 150 N.W.2d 606, 609 (1967). The Iowa Supreme Court has also said that every reasonable doubt must be resolved in favor of constitutionality. *Hansen v. Haugh*, 149 N.W.2d 169, 174 (1967). Planned Parenthood of the Heartland simply has not met its burden to prove that it is entitled to such relief. The State respectfully requests that Petitioner's Motion for Temporary Injunctive Relief be denied.

Respectfully submitted,

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